84-1462

No.-_____

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

RONALD E. JAMES,
Petitioner

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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23 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Is Due Process secured by our Federal Constitution?

2. Do ministerial officers have the right to deny citizens Due Process of Law?

3. What is the root requirement for Due Process?

4. Does a plain, speedy and efficient remedy supersede Title 42 U.S.C. 1983?

5. Does Title 28 secs. 1343 and 1331 lay jurisdiction in Federal Court?

6. Is Petitioner forced to seek redress for damages in state court before being entitled to action under Title 42 U.S.C. 1983?

7. Would it be only the legislature of the State of California who may abrogate Petitioners statutory rights?

8. Is Petitioner entitled to a trial on the issues and for lack of Due Process, as affired by the 5th Amendment of the Constitution of the United States?

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STATUTES		PAGE
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Calif. Revenue and Taxation Code		
Sec.	18590	5
	18592	5
	18593	5
	18595	5
	18596	5
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	19081	5

CA. R. & T. Code, Sec. 18590, reads:

"Within 60 days after the mailing of each notice of additional tax proposed to be assessed the taxpayer may file with the Franchise Tax Board a written protest against the proposed additional tax, specifying in the protest the grounds upon which it is based."

CA. R. & T. Code, Sec. 18593, reads:

"The Franchise Tax Board's action upon the protest is upon the expiration of 30 days from the date when it mails notice of its action to the taxpayer, unless within that 30 day period the taxpayer appeals in writing from the action of the F.T.B. to the board."

Title 28 U.S.C. , sec. 1331	1-4-7
Title 28 U.S.C. , sec. 1343	1-4-7
Title 42 U.S.C. , sec. 1983	1-4

OPINION BELOW

The Opinion of the Court of Appeals is attached. (Appendix A)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall..... be deprived of life, liberty, or property, without due process of law.....

The Fourteenth Amendment to the United States Constitution, also provides in pertinent part:

> ..... nor shall any State deprive any person of life, liberity,or property, without due process of law;.....

STATEMENT OF THE CASE

On August 3, 1981, the Petitioner, Ronald E. James, filed a Title 42 U.S.C. sec. 1983, Complaint for Damages in Federal District Court for the Eastern District of California. The complaint was filed for a Denial of Due Process of the California Revenue and Taxation Code. (All reference to the California Revenue and Taxation Code will be heretofore, (Ca. R. & T. Code)).

Jurisdiction was invoked, in Federal District Court, pursuant to Title 28 U.S.C. secs.1343 and 1331.

The Petitioner alleged in the complaint and by affidavit that he had received only four (4) unexecuted form letters. These four (4) unexecuted form letters were sent to petitioner through the postal service, by the California Franchise Board, heretofore(FTB).

The Petitioner received, (#1), an income tax instruction booklet for the year,1978. The Petitioner then received (#2), a "Notice of Income Tax Due", then,(#3), a "Final Notice Before Levy",and the last,(#4) was a "Notice of Tax Lien".

Petitioner wrote to the Respondent's, and made several attempts , via the postal service, informing them of their failure to send this Petitioner a ,"Notice of Proposed Assessment." Therefore depriving the Petitioner the right to a fair hearing and an opportunity to protest.

On October 15, 1981, oral arguments were heard in District Court, Fresno,Ca. on the motion to dismiss for lack of jurisdiction

Petitioner made oral arguments against the dismissal, (see recorders transcript, pages 4 through 12). The U.S. Magistrate took the matter under submission, and then on February 10, 1982, recommended that the case be dismissed for lack of jurisdiction.

On Dec. 30, 1982, United States District Judge, Edward Dean Price, concured with the U.S. Magistrate's recommendation.

The Petitioner appealed and the United States Court of Appeals for the Ninth Circuit upheld the judgement.

The Petitioner filed a timely petition for a rehearing and rehearing en banc and the appeals court rejected the petition.

ARGUMENT

The Petitioner has been deprived of a fair hearing and an opportunity to be heard by dening him the right to protest and appeal, in direct violation of the Fifth Amendment to our Constitution which requires due process of law.

The District Court and the Court of Appeals decided in error concerning the jurisdictional matter, when they declared that they were without jurisdiction to entertain petitioner's complaint, which is out of accord with the statutes 42 U.SC. 1983, 28 U.S.C. 1343 and 28 U.S.C. 1331. These statutes are valid laws of the United States, and also out of harmony with this court.

The Petitioner has relied on the Constitution of the United States, specifically the 5th and 14th Amendments, American Jurisprudence, California Jurisprudence, case law, California Government Code and the CA. R. & T. Code.

California legislature said that first there must be a "demand to file", CA. R. & T. Code, sec. 18648, and then they may issue a "notice of proposed assessment", that authority also comes from CA. R. & T. Code sec. 18648. At that point, the individual is entitled to 60 days in order to "protest" the "proposed assessment", CA. R. & T. Code sec. 18590. The FTB is required to consider the protest, CA. R. & T. Code sec. 18592. If the individual does not agree with the FTB, s action on the "protest", he is entitled to 30 days to appeal to the Board of Equalization, CA. R. & T. Code sec. 18593. The Board of Equalization is required to consider the appeal, CA. R. & T. Code sec. 18595. The Board of Equalizations decision becomes final 30 days after their decision, CA. R. & T. Code sec. 18596. This 30 day grace period was put into the statute so the individual could institute a proceedings in a court of competant jurisdiction to stay the collection, CA. R. & T. Code sec. 19081.

By all the above, the California legislature carefully preserved Due Process of Law.

Because of the blatant disregard of petitioner's due process rights , the respondent's deprived this petitioner his right to protest and appeal, the respondent's acted outside their scope of authority. As explained in the reporter's transcript, Oct. 15, 1981, at page 2 ,line 6 thru 14 where Mr knight, attorney representing respondents, told the court that,....."some mail had been returned from the Pine Grove address....." Mr. Knight didn't say what mail, just "some mail", regardless, the respondent's shot circuited petitioner's statutory procedural rights.

Joint Anti-Fascist Refugee Committee v. McGrath, 71 S. Ct. 624, at page 630:

> ".....Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

The petitioner holds that the respondent's acted in complete contridiction of the CA. R. & T. Code, the Constitution of both the United States and California.

California Government Code sec.820 is very clear as put forth in Johnson v. Duffy 588 F 2d. 740 (1980) in these words:

> " However, California law expressly imposes liability on a public employee for his own act or omission."

Petitioner has stated all along in his pleadings that the respondents had acted in reckless disregard and omission in dening petitioner his due process rights. Therefore, acting without adequate determining principle, and absolute abuse of their discretion.

This suit was filed in Federal Court and jurisdiction of the court was under 28 U.S.C. sec. 1343 and 1331. The complaint stated a claim arising under the Federal Constitution, one that isn't merely superficial or frivolous, but is substantial. See: Hagans v. Lavine, 415 U.S 528, (1974), Silva v. Vowell, 621 F 2d. 640,645 (1980)

The denial was an invidous contravention of the 5th and 14th amendments due process clause.

The respondent's argue that petitioner was provided a plain, speedy and efficient remedy through the Calif. Cts. After reading petitioner's pleadings, how could anyone take for granted that the petitioner did have that opportunity? The Anti-injunction Act does not apply here at all. This is not a tax case, this case is a strict case of Denial of Due Process. The petitioner isn't attacking the constitutionality of a tax, he is attacking the malicious assault on his constitutional safeguards.

Respondents damaged petitioner and once the damage was done, a simple discontinuance of the hold on property surely didn't heal the harm it caused, the damage had already been done. See: "Plaintiffs Objection to Magistrates Recommendation", page 2, line one.

All the authorities cited by respondents are tax cases, or cases against the

state, or some case completely way off course, not pertaing to this suit at all, as shown in petitioners argument in, "Plaintiff's Objection to Magistrates Recommendation", pages 3-4-5 & 6.

It's very obvious that the lower Federal Ct. and Appeal Ct. would let the state deny another or more people due process of law and uphold that very doctrine. The District Ct. and Appeal Ct. has departed in this case from the principles established by, Davis v. Passman, 442 U.S 228,(1979), at page 246, where Justice Brennan gave the opinion of the Court, said: "As Butz v. Economou stated only last term:

> "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
> "' No man in this courtry is so high that he is above the law....."U.S. v. Lee 106 U.S. 196 (1882).

and as far back as 1883 in Hagar v. Reclamation Dist.#108, 111 U.S.701.

Justice Brennan in delivering the opinion of the Court, in, Carlson v. Green, 100 S. Ct. 1468, (1980) at page 1475, stated:

> "A state official comtemplating illegal activeity, must always be prepared to face the prospect of a Sec. 1983 action being filed against him."

By not adhering to the statutes and the law of the land, respondents were not constant with controlling authority. See: Beck v. Ransome-Crummey Co., 42 Cal. App. 674, (1919), Simon v. Croft, 182 U.S. 431(1900), Duncan v. State of Missouri, 152 U.S. 377,(1893), and McMillen v. Anderson, 95 U.S. 37,(1877).

CONCLUSION

Petitioner believes there is a Federal question arising under the Constitution of the United States and prior decisions of this Court, and furnishes compelling reason for granting this Writ of Certiorari to review the judgement and opinion of the lower Cts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of this Writ of Certiorari have been served by mail to respondents, on this 18th day of January, 1985.

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APPENDIX A

RONALD E. JAMES,
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. 83-1634
D.C. #CV-F-81-257-EDP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Submitted:* Feb. 10, 1984

Filed: Apr. 6, 1984

MEMORANDUM

Appeal from the District Court of the United States for the Eastern District of California.

Before: Choy, Pregerson, and Canby, Circuit Judges.

James appeals the district court's dismissal of his Sec. 1983 action for damages. James alleged that he was deprived of due process because he did not have an opportunity to protest a Franchise Tax Board assessment. The district court dismissed for lack of jurisdiction.

The Tax Injunction Act, 28 U.S.C. Sec. 1341, deprives the federal courts of jurisdiction over Sec. 1983 actions when there is a plain, speedy, and efficient remedy in state court.

Comenout v. Washington, 722 F.2d 574 (9th Cir. 1983). The refund action provided by California Personal Income Tax Law is a plain, speedy, and efficient remedy such as to invoke the restraints of Sec. 1341. Randall v. Franchise Tax Board, 453 F.2d 381 (9th Cir. 1971); Aronoff v. Franchise Tax Board, 348 F.2d 9 (9th Cir. 1965). James can pay the assessment and pursue a refund action in the California courts. The district court properly found subject matter jurisdiction lacking and dismissed the action.

Accordingly, the judgment is affirmed.1/

Footnotes

* The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. 34(a).

1/ The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21, of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoingpublication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

APPENDIX B

RONALD E. JAMES,
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. 83-1634
D.C. #CV-F-81-257-EDP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT. 31, 1984

ORDER

BRFORE: CHOY, PREGERSON, and CANBY,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.
Fed. R. APP.P.35 (b).

The petion for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

RONALD E. JAMES
Plaintiff-Appellant,

v.

G. ALAN HUNTER and
GERALD GOLDBERG,
Defendants-Appellees.

No. 83-1634
DC # F-81-0257 EDP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV. 29, 1984

ORDER

ORDER - ON MOTION FOR STAY OF MANDATE

Appellant's motion for a stay of the mandate is granted. Issuance of the mandate is stayed until December13, 1984. See Fed. R. App. P. 41(b).

No.

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